SINGAPORE REPORTS

James Png Construction Pte Ltd v Tsu Chin Kwan Peter

HIGH COURT (SINGAPORE) — DC SUIT NO 2155 OF 1990
KARTHIGESU J
29 NOVEMBER 1990

Contract — Building contract — Final certificate — Validity — Whether architect could issue before end of defects liability period — Singapore Institute of Architects Conditions of Contract (1979 Ed), cl 30(6)

Contract — Building contract — Final certificate — Conclusiveness — Whether employer's claim a claim for damages for defective work and consequential losses

Contract — Liquidated damages — Building contract — Whether contractors liable — Singapore Institute of Architects Conditions of Contract (1979 Ed), cl 22

By an agreement in writing, the plaintiffs, building contractors, agreed with the defendant, the owner of a single-storey detached house on lot 116-97 mukim 22 known as No 3 Rosyth Avenue, to construct and complete an additional storey thereon for a lump sum payment of $118,800. The agreement incorporated the Singapore Institute of Architects Conditions of Contract (1979 Ed) ('the conditions'). Due to disputes over defects rectification between the defendant and his architect, payment of the balance due under the interim certificate of payment No 4, and the amounts due under the penultimate and final certificate to the plaintiffs totalling $37,157.50 were not made. Upon the plaintiffs' application for summary judgment, the deputy registrar gave judgment for $11,342.13 and allowed $25,615.37 to proceed to trial. Both parties appealed. On appeal, the defendant contended first, that no valid final certificate was issued as it was issued prematurely before the end of the defects liability period; second, that the defendant's claims were for damages for defective work and consequential losses and thus not covered by the conclusiveness of the final certificate; and third, that the plaintiffs were liable for three months' rental of $3,900 being liquidated damages.

Held, allowing the plaintifffs' appeal and dismissing the defendant's appeal:

(1) Clause 30(6) of the conditions does not impose by express words a prohibition on the architect that he shall not issue a final certificate before the end of the periods (whichever is the latest) therein limited. Nor can it be implied. It simply sets out the latest period by which the architect must issue his final certificate.

(2) In this case, it was open to the architect to issue his final certificate at any time after 31 March 1989 and before 31 October 1989 provided that he was satisfied the defects he had listed had been made good by the plaintiffs to his satisfaction. Therefore, the final certificate issued by the architect was perfectly valid and its conclusiveness cannot be impugned.

(3) The defendant's claim for $25,615 when broken down to its component parts cannot be said to be a claim for damages for defective work or consequential losses. This amount constituted sums that had been spent by the defendant in rectifying defects, work done and loss caused by the plaintiffs' delay in rectifying defects. These sums do not constitute damages for defective work as they did not relate to the architect's list of defects and which in any case cannot be maintained in view of the conclusiveness of the final certificate.

(4) The defendant's claim for $3,900 as liquidated damages was not claimable as the works had been certified as completed before the date of completion stated in the appendix to the agreement and furthermore the architect has not certified in writing that liquidated damages were payable by the plaintiffs as required by cl 22 of the conditions.

Case referred to

1 *P & M Kaye Ltd* v *Hosier & Dickinson Ltd* [1972] 1 All ER 121 (distd)

Raymond Chan for the plaintiffs.
Paul Lee for the defendant.

Cur Adv Vult

Karthigesu J: By an agreement in writing dated 14 July 1988 ('the agreement') the plaintiffs, who are building contractors, agreed with the defendant, the owner of a single-storey detached house on lot 116-97 mukim 22 known as No 3 Rosyth Avenue, to construct and complete an additional storey thereon ('the works') for a lump sum payment of $118,800. The agreement incorporated the Singapore Institute of Architects Conditions of Contract, 1979 Edition ('the conditions').

The schedule to the agreement provided for the site to be delivered into the possession of the plaintiffs on 1 August 1988 and for the completion of the works by 28 February 1989. The schedule to the agreement further provided by reference to cl 30(1) of the conditions for certificates of interim payments to be presented to the defendant at monthly intervals which were required to be paid by the defendant within 14 days of presentation.

An interim certificate of payment No 4 dated 29 December 1988 for $34,134 issued by the architect was duly presented to the defendant for payment. Part payment thereon was made by the defendant on 20 January 1989 in the sum of $20,134 leaving a balance of $14,000.

Another certificate of payment intituled 'penultimate certificate', which is but an interim certificate, dated 22 February 1989 for $15,975.75 issued by the architect was duly presented to the defendant for payment. No payment was made thereon by the defendant.

By a letter dated 3 February 1989, the architect certified practical completion of the works under cl 15(1) of the conditions to have been effected on 31 January 1989. The effect of this is that the period for making good defects commences from the date so certified. The period provided in the schedule to the agreement for making good defects was six months. Accordingly the defects liability period would end on 31 July 1989. The architect, also, at the same time as issuing the certificate of completion issued a list of defects which the plaintiffs were required to make good at their

own cost. This they were required to do by 15 March 1989. The architect's letter dated 3 February 1989 enclosing the certificate of practical completion and the list of defects, inter alia, reads as follows: 'This certificate is issued under the condition that you rectify the list of defects attached herewith by 15 March 1989.' This date was later extended to 31 March 1989.

The defendant, however, had other notions as to what the defects were and compiled his own list which he forwarded to the architect on 13 February 1989. There were other contentions between the defendant and his architect as well, as can be seen from the defendant's letter to the architect dated 16 June 1989 and the architect's reply dated 26 June 1989 both of which I set out below, although the defendant's letter was marked 'without prejudice' which he himself disclosed in his affidavit filed in these proceedings on 22 October 1990.

The defendant's letter dated 16 June 1989 is as follows:

Dear Sirs,

Re: Final Accounts: Additional storey to single-storey detached house at No 3 Rosyth Avenue

A copy of your final accounts dated 12 June 1989 has been received. We found the accounts objectionable for the following reasons.

1 From the figures on the final certificate, it appears that you have awarded the contractor full payment of the principle contract sum of $118,800 even though he has not completed the works.
The figure $135,958.50 includes the amount of all the variation orders (VOS) 1 to 8 which amounts to $21,787.50. The amount of $4,629 which is the difference between the contract sum of $140,587.50 and the total estimated value of work to date of $135,958.50 is omitted from the VO 1. This shows that the contract sum of $118,800 has been fully awarded without any adjustments.
2 You have now admitted certain alleged, VO charges which were rejected before, eg the cost of $3,200 for raising the height of the first storey. You have ignored this when it was first claimed on 21 November 1988 by the contractor on the third progress payment. This is reflected in your certificate No 3 dated 23 November 1988. The same item has been rejected again as shown in the B variations which is attached together with the penultimate certificate dated 22 February 1989. The reason it is rejected by you is known and we feel there is no need to go into it again. The other alleged VOS will be dealt with at the appropriate time.
3 On the telephone, you mentioned that you have taken into consideration the omissions and adjustments were made to offset these from the VOS. We would appreciate it if you could send us a copy of your workings or statement.
4 We have written to you about the defects, deviations and damages, but no where in your final statement is there any mention about these or the cost involved in rectification and restoration.
5 Since the contractor abandoned the project more than two months ago excluding the extension of time given by you, you have not been helping us but left it to us to tackle the problem of sourcing for contractors to complete the works. And as most of the bills for these works have not been submitted to you, how could your final account be final!

We would inform you that we find your final account bias and we are not accepting it. You have acted partially in your dealings in favour of the contractor and the fact that you deliberately overlook the very significant and serious deviations from plan in the construction of the roof is a glaring example of your partiality.

We will be claiming for liquidated damages, rent of the premises for the duration of the project, time, effort and money spent on this problem and also for economic loss which is a direct result of neglecting my own business, the cause of which was also precipitated by the contractor.

The architect's reply dated 26 June 1989 is as follows:

Dear Sir

Proposed Additional Storey To Existing Single-Storey Detached House On Lot 116-97 Mk 22 At No 3 Rosyth Avenue

We refer to your letter of 16 June 1989 regarding our final accounts for your above project.

We wish to clarify as follows:

1 Technically the project is completed. We do not deny the fact that there are defects which are not rectified by the contractor. (Refer our letters of 3 February, 16 March and 4 April 1989 to the contractor.)
2 Non-certification of certain variation works in our certificate of progress payment does not imply that we agree or disagree with the contractor's claim. Please note that those variation works which constitute an omission are never mentioned in any of our said certificates.
3 As this is a lump sum contract, there are no bills of quantities attached. Our final account is our statement.
4 Please refer to item 1 of our comments.
5 In regard to our non-commitment in sourcing for contractors to rectify the defect works, we have put our stand to you in our letter of 8 April 1989. Furthermore we are unable to wait for your bills as contractually, we have to complete the final account within six months from the date of practical completion.
6 We have not overlooked the variations in the roof construction. In fact our Mr Tan highlighted this when he handed the final account to you and explained that the omission of the concealed gutters were set off with the gable walls. If you can recall then, you even claimed that the contract drawings in our copy of the contract differ from that of your copy.

Finally, we like to comment that in our letter of 29 March 1989, we have proposed that a quantity surveyor be engaged as the third party to assess the defect works, however, in your letter of 1 April 1989, you felt that we would be the 'better person' to do so. Thus your final account may be taken as a base for negotiation of your disputes with the contractor.

Notwithstanding the exchange of the two above letters the architect issued his final certificate pursuant to

cl 30(6) of the conditions on 12 June 1989. It provided as follows:

Contract sum	$118,800.00
Variation orders to date	$ 21,787.50
Final contract sum	$140,587.50
Estimated value of work to date	$135,958.50
Amount authorized for payment to date	$128,776.75
Amount due to contractor (plaintiff)	$ 7,181.75

It should be noted that the amount authorized for payment to date includes the amounts certified for payment by the interim certificate of payment No 4 and the penultimate certificate.

No written request to concur in the appointment of an arbitrator was given by the defendant before the issue of the final certificate vide cl 30(7) of the conditions. No further payments since the payment on 22 February 1989 above referred to were made by the defendant. Thus the plaintiffs commenced proceedings in the subordinate courts on 12 April 1990 claiming payment of the balance due under the interim certificate of payment No 4, and the amounts due under the penultimate certificate and the final certificate totalling $37,157.50.

On 2 May 1990, the plaintiffs applied for summary judgment which was listed for hearing on 14 June 1990. The defendant applied on 8 May 1990 for a stay pursuant to s 7 of the Arbitration Act (Cap 10, 1985 Ed) but since the subordinate courts have no jurisdiction to hear such an application the defendant then applied by originating summons to the High Court for a stay. The High Court refused a stay. The defendant did not appeal against the High Court's refusal of a stay.

Ultimately the plaintiffs' application for summary judgment was heard by the deputy registrar of the subordinate courts who gave the plaintiffs judgment for $11,342.13 and allowed $25,615.37 to proceed to trial. The plaintiffs now appeal to set aside the order giving the defendant unconditional leave to defend the action for the balance sum of their claim of $25,615.37 and the defendant appeals to set aside the order granting judgment to the plaintiffs of the sum of $11,342.13.

The plaintiffs' counsel relies on what is now settled authority in so far as the conditions, that is to say the 1979 edition, are concerned as to the conclusiveness of the final certificate where the employer (the defendant) has not made a written request to concur in the appointment of an arbitrator before its issue. There are three exceptions to the conclusiveness of the final certificate provided in cl 30(7) of the conditions. The defendant has not sought to bring himself within any one of the three exceptions. It must follow that there can be no defence to the claim.

The defendant's counsel does not dispute this but contends firstly that no valid final certificate was issued by the architect as it was issued prematurely before the end of the defects liability period. It will be noted that the final certificate was issued on 12 June 1989. The defects liability period, having regard to the practical completion of the works having been certified as effected on 31 January 1989, would have ended on 31 July 1989.

The basis of this submission is a passage in the dissenting speech of Lord Diplock in the House of Lords decision of *P & M Kaye Ltd* v *Hosier & Dickinson Ltd*[1] at p 140 where he said:

> Subclause (6) (the standard form RIBA Conditions of Contract there considered are pari materia with the SIA Conditions of Contract in this case) imposes on the architect a duty to issue the final certificate not later than three months after certain conditions are fulfilled. It cannot be issued until after the defects liability period has expired, but the subclause expressly contemplates that the final certificate must be issued notwithstanding that defects may have appeared during the defects liability period, as happened in the instant case. It provides that in that event the final certificate shall not be issued until completion of the remedial works by the contractor — a date which is itself fixed by a certificate of completion of making good the defects issued by the architect under cl 15(4).

Counsel relied on and emphasized the phrase 'It cannot be issued until after the defects liability period has expired' from the above quoted dissenting speech of Lord Diplock.

In my view however sub-cl (6) does not impose by express words a prohibition on the architect that he shall not issue a final certificate before the end of the periods (whichever is the latest) therein limited. Nor can it be implied. It simply sets out the latest period by which the architect must issue his final certificate. The words of this subclause I think bear me out.

Clause 30(6) of the conditions reads as follows:

> *So soon as is practicable but before the expiration of three months from the end of the defects liability period stated in the appendix to these conditions* or from completion of making good defects under cl 15 of these conditions or from receipt by the architect of the documents referred to in para (b) of sub-cl (5) of this condition, whichever is the latest, *the architect shall issue the final certificate* ... (Emphasis added.)

Accordingly this date is 31 October 1989 in the instant case.

In my view, Lord Diplock in the passage of his speech quoted above was directing his attention to defects which had arisen during the defects liability period as had happened in the case under review by the House of Lords. Further it will be noted that the other Law Lords did not feel it necessary to base their decision on a reading of sub-cl (6) which they reserved. It will also be noted that immediately preceding the phrase relied

on by the defendant's counsel Lord Diplock acknowledges the architect's duty 'to issue the final certificate *not later than* three months after certain conditions are fulfilled' (emphasis added). What I think Lord Diplock meant was that the architect would not or should not issue the final certificate until after the end of the defects liability period because once the final certificate is issued before the end of the defects liability period and defects occur during the defects liability period the architect will have to assume the risk on account of the conclusiveness of the final certificate both as to completion and as to the quality of the workmanship.

In the instant case it will be noted that when issuing his certificate of practical completion the architect had fixed 15 March 1989 which he later extended to 31 March 1989 to make good the defects he had listed. In my view it was open to the architect to issue his final certificate at any time after 31 March 1989 and before 31 October 1989, provided that he was satisfied the defects he had listed had been made good by the plaintiffs to his satisfaction. The fact that he did, evidences that the architect was satisfied that the defects he had listed had been made good to his satisfaction. He did not have to wait until 31 July 1989.

I therefore hold that the final certificate issued by the architect on 12 June 1989 was perfectly valid. Its conclusiveness cannot be impugned. If the defendant contends, as he does, that the architect had not listed all the defects which he ought to have listed or that the listed defects were not satisfactorily done, then the defendant's redress is against the architect. He cannot, as the authorities now stand, withhold payment to the plaintiffs.

Ancillary to the above argument, the defendant's counsel submitted that since the architect in his letter to the defendant dated 26 June 1989 (already set out above) which was written after the issue of the final certificate stated, 'We do not deny the fact that there are defects which are not rectified by the contractor' the architect never intended the final certificate to be a final certificate. I cannot accept this argument. Clearly this inference cannot be drawn from the architect's letter of 26 June 1989. If an inference can be drawn from that letter it is that the architect had cl 30(6) and (7) of the conditions in mind when he issued the final certificate and therefore intended it to be a final certificate.

A further point taken by the defendant's counsel was that the defendant's claims were for damages for defective work and claims in the nature of consequential losses. Accordingly it was argued that these claims were not covered by the conclusiveness of the final certificate and thus the defendant should at least be given leave to defend the plaintiffs' claim to the extent of $25,615 which the defendant claimed he was entitled to set off against the plaintiffs' claim.

Again the defendant's counsel relied on the dissenting speech of Lord Diplock in the case already referred to above. At p 142 of the report he said:

> Disputes under the contract may be of two kinds: disputes, on the one hand, as to whether the architect acted reasonably in signifying his satisfaction of the way in which the works had been carried out or completed or in ordering adjustments to be made to the contract sum, and disputes, on the other hand, as to matters in respect of which the architect has no function to perform. In a contract by which the parties have agreed to accept 'the reasonable satisfaction of the architect' as the prima facie criterion as to whether particular obligations under the contract have been performed, there is good business sense in distinguishing breaches of these obligations from other obligations arising under the contract, and in providing a time limit after which neither party can dispute the reasonableness of any satisfaction he has expressed as to the performance of any such obligation. In my opinion, this is what is done by cl 30(6) and (7).

Even if the above is taken to be a correct statement of the law and it must be said that the majority of the Law Lords refused to express a view on this point, the defendant's claim for $25,615 when broken down to its component parts cannot in my view be said to be a claim for damages for defective work or consequential losses. It was claimed that the defendant himself had spent $17,445 in rectifying some defects. A sum of $4,270 was claimed as the estimated cost of rectifying works undone and $3,900 as three months' rent of alternative premises the defendant had to rent before he could reoccupy No 3 Rosyth Avenue caused by the plaintiffs' delay in rectifying defects.

It will be remembered that the defendant had his own list of defects and the sums of $17,445 and $4,270 must have related to them and not to the list of defects compiled by the architect. The defendant was already in contention with the architect on this question soon after practical completion. In my view these two sums do not constitute damages for defective work by the plaintiffs, which in any case cannot be maintained in view of the conclusiveness of the final certificate. Quite clearly they constituted payments for work outside the contract and are not claimable by the defendant.

The three months' rental of $3,900 was claimed as liquidated damages. (See the defendant's letter to the architect dated 16 June 1989 set out above.) Liquidated damages are payable by the plaintiffs under cl 22 of the conditions for delay in completing the works by the date of completion stated in the appendix to the conditions. They have to be certified by the architect in writing. In this case the works were completed as certified by the architect on 31 January 1989. The date of completion stated in the appendix is 28 February 1989. Furthermore the architect has not certified in writing that liquidated damages are payable by the plaintiffs. In my view this sum is also not claimable by the defendant.

I would accordingly allow the plaintiffs' appeal and enter judgment for the plaintiffs in the sum of $37,157.50 together with interest thereon at the rate of 6% pa from the date of the writ of summons, namely, 12 April 1990, the costs of this appeal and the costs in the district court. The defendant's appeal will be dismissed with costs.

Appeal allowed.

Solicitors: *Fam Tay & Lee; Chan Tan & Partners.*

Reported by *Kevin Mathews*

Syed Yacob v Syed Alwee & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NOS 936 OF 1986 AND 937 OF 1986
CHAN SEK KEONG J
23 NOVEMBER 1990

Trusts and Trustees — Construction of trust deed — Rectification of trust deed — Difference between construction and rectification — Standard of proof of rectification

Civil Procedure — Issue estoppel — Cause of action estoppel

Words and Phrases — 'Grandchildren'

Syed Shaikh, a wealthy landowner, had with his brother, Syed Mohamed, created a settlement ('the 1888 settlement'), the subject matter of Originating Summons No 936 of 1986. Syed Shaikh, in addition, alone had created five other settlements (of which one, the 1893 settlement, was the subject matter of Originating Summons No 937 of 1986). The issue in the present cases related to the clauses in the two settlements which provided for the distribution of capital to '. . . such persons or persons then living as is or are the grandchild or grandchildren of the settlors or either of them or' their brother. The plaintiff sought either a declaration that the capital of the settlement was distributable not only to the abovenamed grandchildren but also in the case of those grandchildren who died prior to the date of distribution, that their issue would be entitled to share per stirpes in the distribution, or a rectification of the capital clause by deleting certain words and adding other words so that it was not the grandchildren of the settlors and their brother who would be entitled to the capital but only the successors of their brother who would be so entitled. It was contended by the trustees and beneficiaries that the plaintiff was estopped by the decision in *Re Alkaff's Settlement*,[1] a decision on the construction of the capital clause of the 1888 settlement, from relitigating the effect of the capital clause.

Held, dismissing the applications:

(1) The decision in *Re Alkaff's Settlement*[1] operated as a cause of action estoppel as well as an issue estoppel against the plaintiff in relation to the construction claim as he is asserting as a cause of action, the subject matter of the previous determination, which is binding on him by reason of the representation order made by the court in that decision until it is reversed by a higher court.

(2) The proper course for the plaintiff on the point of the construction would be to have applied to the Court of Appeal for an extension of time to appeal and to adduce new evidence before the court.

(3) Rectification is different from construction. The primary purpose of a construction action in relation to an instrument is to ascertain the intention of the maker from the words used by him, whereas the primary purpose of a rectification action is to substitute new words for those actually used by the maker to reflect his true intention.

(4) Extrinsic evidence could only be adduced to construe a document if it was ambiguous. The cases showed that the word 'grandchildren' was not always plain, precise and unambiguous. The court was therefore willing to admit the evidence adduced by the plaintiff for the purpose of determining the intention of Syed Shaikh.

(5) The evidence adduced however showed that Syed Shaikh intended that only the living grandchildren should share in the capital. The most telling piece of evidence was that he had in relation to the income of the trusts expressly provided for the manner in which the children of the deceased beneficiaries were to take their parents' shares.

(6) The standard of proof for rectification was 'beyond all doubt' or 'the clearest and the most certain demonstration of error'. This burden becomes more difficult to discharge with the passage of time. Here the plaintiff was trying to discharge the burden 100 years after the first settlement. He could not possibly succeed on the claim for rectification when, on the same evidence, he had failed on the construction issue. Both actions were thus dismissed.

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal Nos 126 and 127 of 1990.]

Cases referred to

1 *Re Alkaff's Settlement* [1971] 1 MLJ 242 (folld)
2 *Re Syed Shaikh Alkaff* [1923] 2 MC 38 (refd)
3 *Henderson* v *Henderson* [1843-60] All ER Rep 378 (refd)
4 *Hoystead* v *Commissioner of Taxation* [1926] AC 155 (refd)
5 *Re Koenigsberg* [1948] 1 Ch 727 (refd)
6 *Badar Bee* v *Habib Merican Noordin* [1909] AC 615 (refd)
7 *New Brunswick Railway* v *British & French Trust Corp* [1936] 1 All ER 13 (refd)
8 *Thoday* v *Thoday* [1964] P 181 (refd)
9 *Mills* v *Cooper* [1967] 2 All ER 100 (refd)
10 *McIlKenny* v *Chief Constable of the West Midlands* [1980] 2 All ER 227 (refd)
11 *Re Manly's Will Trusts (No 2)* [1976] 1 All ER 673 (refd)
12 *Arnold* v *National Westminster Bank* [1988] 3 All ER 977 (refd)
13 *Arnold & Ors* v *National Westminster Bank* [1990] 1 All ER 527 (refd)
14 *National Westminster Bank* v *Arthur Young McClelland Moores & Co* [1985] 1 WLR 1123 (refd)
15 *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529 (refd)
16 *Lawlor* v *Gray* [1984] 3 All ER 345 (refd)
17 *Re Waring (Decd)* [1948] 1 All ER 257 (folld)
18 *Re Alsagoff* [1958] MLJ 264 (distd)
19 *Whitby* v *Mitchell* (1890) 44 Ch D 85 (refd)
20 *Syed Ali & Ors* v *Syed Omar & Ors* (1918) 15 SSLR 103 (distd)
21 *Khoo Hooi Leong* v *Khoo Hean Kwee* [1926] AC 529 (refd)
22 *Overstone Ltd* v *Shipway* [1962] 1 All ER 52 (refd)
23 *Re Hall* [1932] 1 Ch 262 (refd)
24 *Bonhote* v *Henderson* [1895] 1 Ch D 742 (refd)
25 *Banks* v *Ripley* [1940] 1 Ch 719 (refd)
26 *Whiteside* v *Whiteside* [1950] 1 Ch 65 (refd)